Registry's translation, the French text alone being authoritative.

EIGHTY-SECOND SESSION

In re Baillet (No. 2), Boeker, Bousquet, Cervantes (No. 2), Criqui, Kagermeier (No. 3) and Raths (No. 3)

Judgment 1618

The Administrative Tribunal,

Considering the common complaint filed by Mr. Bernard Jean Raymond Baillet (No. 2), Mr. Jean-Pierre Cervantes (No. 2), Mr. Jean-Jacques Criqui and Mrs. Ingrid Maria Kagermeier (No. 3) against the European Patent Organisation (EPO) on 30 August 1995 and corrected on 24 November 1995;

Considering the common complaint filed against the Organisation by Miss Ruth Boeker, Mr. Karl Bousquet and Mr. Gaston Raths (No. 3) on 14 September 1995 and corrected on 24 November 1995;

Considering the EPO's single reply on 7 March 1996, the complainants' rejoinder of 12 June and the Organisation's surrejoinder of 5 August 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are permanent employees of the European Patent Office, the secretariat of the EPO. At the material time they were staff representatives.

At a meeting on 29 April 1992 the President of the Office told the chairmen of the staff committees from the Office's duty stations that he would be asking the EPO's Administrative Council to approve rules to allow the employment of staff under fixed-term contracts. He intended, he said, to consult the General Advisory Committee (GAC) so that he could put proposals to the Council in December 1992. The staff representatives expressed reservations about the sort of contracts he had in mind.

By a letter of 16 November 1992 the chairman of the Central Staff Committee, Mr. Bousquet, asked the President of the Office to remove his proposals from the Council's agenda or, failing that, treat his letter as an internal appeal.

At its 46th Session, which it held from 8 to 11 December 1992, the Council adopted the President's proposals with amendments. The relevant paper was CA/D 15/92 of 11 December 1992.

In a letter of 8 January 1993 the Director of Staff Policy informed Mr. Bousquet that the President had rejected his request and referred it to the Appeals Committee. By a letter dated 17 February Mr. Bousquet told the President that his appeal was also against the carrying out of the Council's decision. From 17 February to 9 March 1993 the other complainants too filed appeals against that decision. In a report dated 30 March 1995 a majority of the Appeals Committee held that the GAC had not received ample information from the Administration and recommended referring the matter to the GAC. The minority recommended rejection.

By letters of 30 May 1995, the impugned decisions, the Director of Staff Policy notified the President's rejection of the appeals.

B. The complainants say that they are acting as permanent employees of the Office, staff representatives or

members of the GAC.

They submit that the EPO failed to observe several formal requirements before bringing in the new rules and thereby showed unwillingness to consult in good faith. The time it gave the GAC was too short for it to draw up a reasoned report. The matter was not as urgent as the President made out. The EPO took on few "contract staff" in the year after the introduction of the new rules. Its refusal to let the staff representatives have the information they needed, such as a legal opinion on the new rules, seriously hampered the work of the joint advisory committees. On essential issues it did not consult the GAC at all. The chairman of that Committee revealed bias by having an article of his published in the EPO *Gazette* in support of the new arrangements before the members of the Committee had discussed the matter.

There was no proper consultation and many important issues were left unanswered. The European Patent Convention (EPC) does not empower the Administrative Council to extend the scope of the Service Regulations and the pension scheme by amendment. It is wrong to fob off permanent duties on contract staff. Article 20 of the Protocol on Privileges and Immunities provides for cooperation between the authorities of contracting parties and the EPO in the area of labour law, among others. But the Office did not find out what the law in member countries said about fixed-term appointments and so cannot have taken it into account. The new rules were improperly rushed through. The Administrative Council declared the Protocol applicable to contract staff, a decision at odds with one it had taken on 20 October 1977 about Articles 14 to 16 of the Protocol.

Conflict between the rules on conditions of employment for contract staff and the Service Regulations is detrimental to the interests of the complainants both as staff members and as staff representatives. Under Article 35 of the Regulations the Staff Committee is elected by permanent employees alone and by no one else. Staff representatives may not take part in the procedure for recruiting contract staff, and that is a serious breach of their acquired rights. Since contract staff may participate in the EPO's pension and health funds the premiums of permanent employees will go up. The recruitment of contract staff on permanent posts limits the prospects of promotion for permanent employees. One acknowledged purpose of the new rules is to release the EPO from the constraints of labour law in member countries. The President of the Office and the Administrative Council did not keep their promise to explain just when the EPO might be granting fixed-term appointments.

The complainants want the Tribunal to (1) declare the Council's decision CA/D 15/92 of 11 December 1992 to be inapplicable; (2) order the President of the Office to ensure that contract staff, who have accepted offers of employment in good faith, suffer no material injury on that account; and (3) award 10,000 German marks in moral damages and 15,000 marks in costs.

C. In its reply the EPO rebuts their arguments. In its submission the chairmen of the staff committees at the various duty stations got full information on the proposed terms of service for contract staff. The members of the GAC were able to examine in good time the salient points of the proposals.

Under Article 33(2)(b) and (c) of the Convention the Administrative Council is competent to amend the Service Regulations and the Pension Scheme Regulations. So it is free to extend their coverage to other categories of staff. Again, under Article 17 of the Protocol on Privileges and Immunities, the Council may decide which categories of staff particular provisions of the Protocol are to apply to.

The EPO consulted the GAC according to the proper procedure. There was nothing wrong in the President's setting a deadline for its report. Though only a few contracts were issued the President was quite right to say that the matter was urgent: other schemes of recruitment were not enabling the EPO to find all the staff it needed, and it had to take on fixed-term staff for the purpose. There was no bias in the article in the *Gazette*: it gave an objective review of what were at the time still just proposals. Besides, the rules do not require members of the GAC to be impartial. As to the alleged lack of a legal opinion, the chairman of the GAC was none other than the head of the Legal Department and so was able to answer the other members' questions.

The Administrative Council is competent to amend the Service Regulations so as to enable the Staff Committee to represent further categories of staff. Other international organisations with several categories of staff commonly have a single staff committee to represent them all. Otherwise, being such a small percentage of total staff, contract staff would have no-one to represent them. In any event the complainants may not plead any acquired right to take part in the recruitment of contract staff. Whenever a contract is extended up to a cumulative duration of over three years the procedure for recruitment entails consultation of staff representatives.

Since there is no telling how many contract staff will be recruited and how many will want to join the EPO's pension and health funds, it is hard to gauge the effects that the new rules will have on those funds.

As for career prospects, there will obviously be few contract staff and by the very nature of their contracts they will not be taking over work that could and should go to permanent employees.

So neither as staff members nor as staff representatives have the complainants suffered any injury, and their complaints are accordingly irreceivable.

D. In their rejoinder the complainants press their pleas. In the light of the defendant's reply they submit that since the Council's decision amounted to legislative reform it warranted better preparation and fuller information and consultation. The reply confirms that there was nothing urgent about the new scheme. The complainants say that what they are objecting to is not so much the creation of a new category as the implied amendment of the Service Regulations.

E. In its surrejoinder the EPO says that the rejoinder raises no new issue that in any way causes it to alter its stand.

CONSIDERATIONS

The facts

1. On 11 December 1992 the Administrative Council of the EPO adopted a decision -- CA/D 15/92 -- setting out conditions of service for contract staff.

The draft had earlier aroused opposition from permanent employees of the Organisation. Several of them, acting as members of staff committees or of the General Advisory Committee (GAC), asked the President of the European Patent Office to reverse the Council's decision on the grounds of procedural flaws and breach of their substantive rights.

The President referred their claims to the internal Appeals Committee. The majority of the Committee recommended treating their claims as receivable and allowing them in part; two of its members issued a minority report which recommended dismissing their claims as irreceivable and in any event devoid of merit. By the decisions under challenge the President endorsed the recommendation of the minority.

The complainants have filed suit both as permanent employees and as representatives of staff committees or as members of the GAC. They seek the quashing of the Administrative Council's decision on the grounds both of flaws in the procedure for consultation and of substantive flaws.

2. They sum up their pleas as follows in their rejoinder:

"Procedural flaws and the lack of consultation on several important issues meant that there was no proper consultation.

The Administration tampered with the Service Regulations both in substance (Staff Committee and social contributions) and in form (failure to put through express amendments).

The purpose of the new rules is to evade the requirements of labour law in member countries.

The President broke a promise in that there is no decision of the Council's explaining what sort of work contract staff would be doing."

The Organisation demurs. It says that there was proper consultation; that the staff representatives had all the time and information they needed to make up their minds; constructive proposals from them made for worthwhile changes in the draft and final texts; and the President kept his promise to explain what sort of jobs contract staff would be doing. On the merits the EPO submits that the rules on contract staff are in keeping with general principles of law and do not harm the interests of permanent employees.

3. The complainants are challenging the Council's decision both on procedural grounds -- for lack of proper consultation of the staff -- and on the merits -- for failure to comply with general principles of law. The Tribunal will take up the issues of receivability and the merits separately.

Receivability

4. What the complainants are challenging is a legislative act that is general in thrust.

In keeping with Article VII of its Statute the Tribunal will declare a complaint against a general decision receivable when it is itself subject to internal appeal. But when it needs to be put into effect by individual ones the complaint to the Tribunal will be irreceivable: see Judgments 624 (*in re* Giroud No. 2 and Lovrecich), 625 (*in re* Desmont and Gagliardi), 626 (*in re* Giroud No. 3 and Caspari), 1081 (*in re* Albertini and others) under 4, 1134 (*in re* Ngoma) again under 4, 1329 (*in re* Ball and Borghini) under 5 and 6 and 1520 (*in re* López-Lahesa Nos. 1 and 2 and others) under 5 to 7.

Thus Judgment 1451 (*in re* Hamouda and others) -- see 19 to 21 -- said:

"... the staff member need not ordinarily impugn at once a general decision he believes has caused him injury but may, without any risk of being time-barred, wait until the general decision affects him in the form of an individual one."

In those cases, which were about a change of jurisdiction over disputes about pensions, the Tribunal further held that -

"... every staff member has an actual and present interest in having light shed on the matter. The Tribunal affords guarantees of a system of international law ... It would ... be wrong to deny the staff the right of appeal on the grounds that the impugned decision is general in purport ... The conclusion from the foregoing is that in the circumstances [the objection to receivability] must fail."

The Tribunal therefore declared the complaint against the general decision to be receivable.

5. In this case the complainants set out their objections in an internal appeal that the President of the Office referred to the Appeals Committee. For the same reasons as those stated in Judgment 1451 the present complaints are receivable. What is at issue is not a general decision setting out the arrangements governing pay or other conditions of service. Such arrangements take the form of individual implementing decisions that each employee may eventually challenge, say about his pay, or pension, or the amounts of contributions from employer or employee. What is at issue here is the adoption of rules on the employment of contract staff that may have indirect effects on the status of permanent employees as to their pay -- if they have to bear a heavier financial burden -- or as to their indirect involvement in the framing of EPO policy through the participation of staff representatives in advisory bodies. The outcome of the case is of foremost concern to third parties, namely the contract staff themselves, who have an obvious interest in knowing whether the rules that govern their employment are lawful. For the sake of efficient management, too, the Organisation plainly needs a prompt ruling on such fundamental issues.

On that score the complaints are receivable.

6. The complainants say they are acting as permanent employees, as members of the staff committees and as members of the GAC.

Citing Judgment 1147 (*in re* Raths) under 3 and 4, the defendant does not dispute their *locus standi* insofar as they are indeed entitled to represent the staff.

That ruling on the receivability of a complaint holds good, there being no need to determine whether any employee would have the same right in a case about rules calculated to safeguard the interests of the staff at large.

So the complaints are receivable on that score as well.

7. Another condition of receivability is that the impugned decision must cause the complainant some injury: there must be a real and present cause of action.

The EPO contends that that condition is not met here on the grounds that the grant of fixed-term appointments to contract staff causes its permanent employees no injury.

Yet that is just what is at issue, and the Tribunal will, when it comes to the merits, entertain their contention that they have suffered injury.

Besides, when a complainant is challenging a general decision that takes the form of a rule, he will have a cause of action provided that there is even a risk that the implementation of that rule may cause him injury. That again was

the *ratio* of Judgment 1451, which held that even where the decision was general the complainant might have a real and present cause of action.

Since the future application of the conditions of service of contract staff may indeed affect the complainants' status, the conclusion is that their complaints are receivable.

The merits

The procedure for consultation

8. The complainants plead breach of their right to be consulted before adoption of the rules on contract staff.

Article 38 of the Service Regulations, which is headed "Joint Committees", reads:

"(1) The joint committees shall consist of:

- a General Advisory Committee,

- Local Advisory Committees.

(2) They shall comprise:

- a Chairman who shall be appointed each year by the President of the Office and who shall not vote save on procedural questions;

- members and alternates appointed at the same time in equal numbers by the President of the Office and by the Staff Committee.

(...)

(3) The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

- any question of a general nature submitted to it by the President of the Office;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36.

(...)

(5) Opinions of the joint committees which are required in respect of administrative decisions must be delivered within the time limits laid down in each case by the President of the Office, such time limits being not less than fifteen working days. Once the time limit has expired, the opinion shall no longer be required."

In Judgment 1062 (*in re* Hofmann No. 2) the Tribunal held in 5:

"Consultation in the context of Article 38 entails giving the GAC enough information to enable it to come to 'a reasoned opinion'. Merely telling it that the Administration would give it more details and provide data on the negotiations if it so wished did not comply with Article 38, which is plainly intended to make for proper consultation between the two sides."

The case that Judgment 1291 (*in re* Hofmann No. 3) ruled on was about the same article. The GAC decided against making a recommendation on the grounds that it had not had the information it needed to do so; but the Tribunal found no evidence of any procedural flaw: inasmuch as the Committee had had "the relevant available information" the Administration had at the material time discharged its duty under Article 38(3). Judgment 1200 (*in re* Kheir, Münster and Turco) was about a similar rule in another organisation. There the Tribunal held in 2:

"What [the rules on consultation] plainly require is co-operation between staff and management. Though it is not to take the form of bargaining, there must be a real exchange of views, and if it is to work both sides must show good faith."

9. The complainants plead a procedural flaw. The gist of it is that some time late in July or early in August of 1992 the Committee's chairman had an article published in the house *Gazette* advocating the very proposals the

complainants took issue with and that he thereby acted in breach of his duty to remain impartial. Though the complainants challenge his impartiality they do not say they ever asked him to stand down.

The chairman has no vote save on matters of procedure and does not determine how the Committee is to report. So his commenting beforehand, at the President's request, on the proposals that had been put to the Committee afforded no grounds for questioning his fitness to chair it. And his being also the head of the legal service was helpful to the Committee. The complainants see bias in his saying at its 92nd meeting that he wanted to confine its debate to point-by-point scrutiny of the proposals on the grounds that it had already had a general debate at its 91st meeting. Yet the mere wish to go ahead in that way affords no grounds for declaring him unfit to chair the Committee and the complainants offer no other specific grounds for doing so.

The conclusion is that his chairmanship was not challengeable and constitutes no procedural flaw.

10. The complainants say that the EPO let them have scant information about its proposals, which were in part faulty through being poorly thought out and in breach of general principles of law.

The purpose of consultations is indeed to shed light on any such defects, but not to allow objections on the grounds that the proposals have been poorly drafted. Poor preparation may warrant delaying discussion or rejecting the proposals, but the GAC may not refuse to report at all on the grounds that it has not had enough information from the Administration.

So the complainants are mistaken in pleading the Administration's failure to prepare the proposals more thoroughly, hold wider consultations with third parties and provide fuller background information such as legal opinions, consultation of other organisations or discussion with governments of member States about the protection of contract staff.

11. The complainants plead breach of their rights in the Organisation's failure to consult them on several issues they see as essential, namely compliance with the European Patent Convention (EPC), with Article 20 of the Protocol on Privileges and Immunities and with the Council's decision of 20 October 1977 on Articles 14 and 16 of the Protocol on Privileges and Immunities, and the scope of the conditions of service of contract staff.

Yet those are not material issues. What Article 38 of the Service Regulations requires is that the Administration put such proposals to the GAC for an opinion. Since it did so, the Committee was free to state any objections it had and indeed it stated them either in its debate or in its report.

So the Committee had ample opportunity to debate the issues to which the complainants are referring.

12. They submit that they never received the detailed studies that the Committee needed to make up its mind.

The Committee's chairman was, as has been said, the head of the legal department and it was he who explained the legal basis for the proposals. For the reasons set out in 18 to 21 below in answer to the complainants' objections to the substance of the decision, the legal issues were not so difficult as to require any advice from outside lawyers. At the two lengthy meetings the Committee devoted to the proposals, one on general issues and the other on particular points, the chairman was indisputably able to give it the information it needed.

13. The complainants submit that the President of the Office set no deadline for the Committee's report, there being no written evidence on that score. But the Tribunal is satisfied on the evidence that successive time limits were expressly set for the Committee. The plea is mistaken in fact.

14. The complainants see another procedural flaw in the Administration's failure to send the proposals as amended by the Administrative Council back to the GAC. That, they say, offended against Article 38 of the Service Regulations.

Article 38 does not expressly require further consultation if proposals are amended after the Committee has reported. The purpose of the rule therein is such that the need for further consultation would be understandable if the proposals had been so radically amended as to be really new ones. In this case they were not. The amendments the Administration made in the text took account of the comments and suggestions made by the GAC and the changes concerned points on which the Committee had already given its views. So there was nothing new about the amended version. Besides, the changes that the Administration put to the Administrative Council followed the drift

of the staff's own proposals: limiting to 5 per cent instead of 10 the proportion of contract staff to permanent employees and saying just when the EPO would be taking on contract staff, so that there should be little or no competition from such staff. Since the amendments reflected the staff's comments and concerns, the text raised no issue that had not already been debated. Staff representatives attend the Administrative Council's meetings, too, and are free to put their views to it. The complainants do not suggest that the EPO prevented them from doing so on this occasion.

Their plea again fails.

15. Their main objection is that the Committee's members did not get enough information to be able to report properly.

That issue is one of fact. There was nothing new about the idea of having contract staff. Indeed Article 33(2)(b) of the European Patent Convention contemplates it. The Council rejected in 1985 and 1986 proposals for that purpose that the GAC had been consulted on beforehand. The permanent employees were worried about the idea at the time. They are represented at various stages in the procedure for introducing a new category of staff. They sit on an informal body known as "Prestacom", a meeting of the President and the chairmen of the staff committees; on the joint GAC; and on the Budget and Finance Committee and the Administrative Council, though there they have no voting rights. In this case the staff representatives played an active part in all those bodies. The President spoke of the subject and explained the purpose at the Prestacom meeting on 29 April 1992 which two members of the GAC, Mr. Cervantes and Mr. Raths, attended. On 26 June 1992 he sent the Committee's chairman a draft text consisting of 17 articles and asked for an opinion. The members got copies on 6 July 1992. Contrary to what the Appeals Committee said the text was complete. The chairman of the GAC said so and the minutes of the Committee's meetings do not record any reservations on that score. The draft was first discussed at the Prestacom meeting of 8 July 1992. The participants had received the draft two days earlier and there was not much discussion. As before, the staff representatives were opposed. The main item on the agenda on the Committee's 91st meeting, held from 27 to 29 July 1992, was the proposals about contract staff. There was a wide-ranging discussion of the general issues in which representatives of the Administration explained why they were in favour while the staff representatives expressed doubt or opposition. At the end of the debate it was suggested that Prestacom should look into the issues of policy "to ensure that there would be enough time left to deal with the proposed decision itself". It was agreed to set aside the second week of September for further deliberation. On 10 August 1992 the chairman of the Central Staff Committee, Mr. Bousquet, who was not a member of the GAC, wrote to ask the President on what jobs the Office intended to be employing contract staff and what the practice was elsewhere. The President's reply of 3 September 1992 said that those questions could be answered orally and that the proposals should go to the Administrative Council at its session of December 1992. The proposals were the main theme of the Committee's 92nd meeting, which it held from 7 to 10 September 1992. It then had before it a version with some drafting changes. The staff representatives were sorry to get no answers to their questions and to have had no prior meeting of Prestacom to talk of the issues of policy; they said they were unable to give "a reasoned opinion" and that a "compromise" could be reached only if it were plainly stated just when contract staff might be recruited and what sort of jobs they would be doing. The staff representatives had reservations about taking part in the discussion of the proposals. There was review of the text point by point and many amendments were proposed, approved by the Committee and endorsed by the President. But the staff representatives refused to give their opinion on the grounds that they felt unable to do so. So the chairman put a report to the President summing up the Committee's proceedings, setting out proposed amendments and passing on the staff representatives' reasons for feeling unable to comment. The report cited the statement by the Administration's representatives that the staff representatives' questions had been answered and that the Committee had had time enough at its 91st meeting to study the matter. Discussion between staff representatives and management continued at the meeting that the Budget and Finance Committee held from 2 to 6 November 1992 and at the meeting the Council held from 8 to 11 December. The Staff Committee submitted its views and material information to the Council. To allay the fears of the staff the President offered to reduce from 10 to 5 per cent of the total number of EPO staff the maximum allowable number of contract staff, identify in Article 1(2) of the proposals the jobs for which contract staff might be recruited and limit the maximum duration of such appointments.

The Administration provided the GAC with the information it needed to give an opinion. There is no doubt that the chairman, as head of the legal department, was able to give the members the explanations they needed. The Administration did not need to seek opinions from lawyers or other experts on matters that the staff were fully able to grasp and solve on their own. The substantive amendments that the staff wanted did not call for further information and did not warrant withholding the Committee's opinion.

The conclusion is that the total period of time that the GAC had in which to give its opinion -- some two months, including two meetings lasting several days each -- was quite sufficient. Although proposals of such importance to the EPO called for careful study, the President had a legitimate wish to settle the matter promptly.

16. The complainants take the Organisation to task -- sometimes the President, sometimes the Council -- for the failure to take the separate decision, which the President had announced, saying in what circumstances contract staff might be appointed. That they see as breach of a promise to the staff.

The EPO denies the charge, pointing out that the President made his statement at the meeting of the Council, which only afterwards decided to add Article 1(2) to the draft. That provision lays down, in keeping with the President's promise, the conditions under which contract staff may be recruited.

Paragraphs 225, 235 and 237 of the minutes of the Council's meeting bear out the Organisation's contention. But even if the complainants' plea had been sound on the facts there would have been no flaw in the consultation procedure or in the substance of the impugned decision: since the alleged omission would be subsequent to that decision it could not invalidate it. The plea is devoid of merit.

The substance of the decision

17. The complainants' objections to the substance of the Council's decision are much the same as the ones already entertained: they say there was breach of their right to a hearing because the Administration failed both to consult the staff and to give them the information they had asked for and needed.

18. First, they object to what they see as conflict between the Service Regulations and the conditions of service of contract staff in that some provisions of the Service Regulations apply directly or by analogy to contract staff as well, namely the provisions on the pension and health funds and on staff representation. That, they submit, offends against general principles of law and may prove discriminatory. They plead breach of Articles 33(2)(b) and (c) of the European Patent Convention, which call for quite separate treatment of the two categories of staff.

Article 33 of the Convention, which is about the Administrative Council's competence, contains the following provisions:

"(2) The Administrative Council shall be competent, in conformity with this Convention, to adopt or amend the following provisions:

(...)

(b) the Service Regulations for permanent employees and the conditions of employment of other employees of the European Patent Office, the salary scales of the said permanent and other employees, and also the nature, and rules for the grant, of any supplementary benefits;

(c) the Pension Scheme Regulations and any appropriate increases in existing pensions to correspond to increases in salaries;"

Those provisions empower the Council to make or amend rules on conditions of service of permanent employees and of other staff. They set no restriction on the Council's authority that would require it to draw an unqualified distinction between the two categories of staff provided that the rules take account of the different nature of their duties. The Council complied with that requirement.

19. The complainants contend that the conditions of service of contract staff are contrary to the spirit of the Convention in that they seriously undermine the status of the permanent employees, particularly in the performance of the "sovereign duties" vested in such staff by the contracting parties.

Article 33(2)(b) of the Convention affords the basis in law for making rules on contract staff. The version approved by the Council limits recruitment of such staff in number and in the nature of their duties: they are to account for no more than one-twentieth of the work force, to serve for up to five years or exceptionally seven, make up for a temporary shortage of staff or perform occasional and non-permanent duties or be employed for such other reasons as may warrant limiting the length of the appointment. At the time when the rules were being adopted there was no reason to assume that the Administration would misapply them to the detriment of permanent employees. Nor do they impair the career prospects of such employees.

20. The complainants submit that the new conditions of service are at odds with a decision that the Council adopted

on 20 October 1977 about permanent employees in pursuance of Articles 14 to 16 of the Protocol on Privileges and Immunities.

But the plea betrays misunderstanding of the relative status of rules and the precept that only the authority that adopted a rule may withdraw it: as the competent authority the Council was free to repeal or derogate from any rule it had itself made.

21. The complainants submit that membership of the pension fund and collective health insurance scheme should not be open to contract staff as it is to permanent employees and that the two categories should be kept distinct in those respects. What they fear is that contract staff may derive proportionally greater benefits for themselves from the pension and health funds and that permanent employees may have to bear a heavier and unwarranted burden of the cost.

The EPO demurs. It points out, for example, that very few contract staff would ever be drawing pensions since to qualify they would have to have a total of at least ten years' service. Before ten years are up they will ordinarily have become permanent employees. And those who leave before the ten years are up will merely withdraw lump-sum benefits with interest. What is more, contract staff have the option of keeping membership of any retirement fund they belonged to in their own country before joining the EPO. As for health insurance, contract staff are younger and less likely to fall ill, so that the interests of permanent employees should not suffer from their participation in the scheme. In any event the EPO says that if it did emerge later that their interests were suffering it would review the rules so as to ensure equal treatment between the two categories.

The principle of equal treatment means that an organisation may not treat differently officials who are in like case. It does not mean that an organisation may not amend its rules short of breach of an acquired right: see Judgments 832 (*in re* Ayoub and others), 986 (*in re* Ayoub No. 2 and others), 1368 (*in re* Aymon and others), 1514 (*in re* Aymon No. 2 and others) and 1515 (*in re* Antoinet No. 3 and others).

Neither the breach of equality that the complainants are alleging, which is merely academic, nor any breach of their acquired rights is established. Their plea is particularly implausible in that the disputed measure offers membership of a common scheme and there is no reason to fear improper application of it when the EPO professes willingness to revise it if it proves discriminatory against permanent employees. For the time being, therefore, there is no objection to allowing both categories of staff to belong to a single scheme.

22. The complainants protest at the EPO's failure to distinguish between categories in the area of staff representation within the Organisation. There too they see impairment of the permanent employees' interests: since contract staff cannot have the same interests, having only fixed-term appointments, there is a risk of their being constrained in dealings with the Administration and having no stake in safeguarding staff interests. A special danger they see is that because of the absence of many contract staff it may prove difficult to reach the quorum required at meetings to appoint staff representatives, particularly at the smaller duty stations -- Berlin and Vienna -- where the proportion of contract staff is rather high.

The EPO retorts that in international organisations it is common not to have different staff representatives for different categories of staff; that the staff bodies are quite able to represent contract staff too; that such staff are likely to be quite able and willing to take an interest in representation of the staff; and that if any serious difficulties arose over representation the rules would of course be changed.

The complainants' misgivings are again merely academic. For the same reasons as those stated above the conclusion must be that at present there is no evidence of any breach of equal treatment of the acquired rights of permanent employees.

23. The complainants argue that the new rules limit the rights of the staff to be represented in the recruitment of contract staff.

The EPO concedes the truth of the point for short-term appointments: the procedure must be simpler for recruiting contract staff than for recruiting permanent employees. Yet at its office in Munich -- it observes -- when appointments are extended to a total of over three years the procedure requires consultation of the staff. Since such decisions are published, staff representatives may make their views known.

The Organisation is plainly mindful of the need to keep staff representatives informed and to consult them, even

though it may quite properly apply different sets of rules for the recruitment of permanent employees and contract staff.

24. The complainants submit that contract staff themselves are poorly treated in that the new rules do not afford them the same safeguards as does the municipal law which is applicable in the absence of a system of collective international agreements and in that they have no entitlement to end-of-service redundancy or unemployment benefits. Those omissions, the complainants say, offend against the dignity of the international civil service and so affect themselves adversely.

For one thing, it is doubtful whether the complainants have sustained actionable injury. Besides, their objections are devoid of merit.

They charge the EPO with infringing Article 20 of the Protocol on Privileges and Immunities by adopting international rules that are wholly or in part in breach of the national labour law that would otherwise apply and which it is thereby trying to evade. Article 20(1) reads:

"The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice to ensure the observance of police regulations and regulations concerning public health, labour inspection or other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol.

..."

The EPO's answer is that the article speaks not of municipal law on contracts of employment -- in particular the possibility of granting fixed-term appointments -- but of such law on matters of public health and labour inspection.

The law of employment in the international civil service is governed foremost by the rules of the international organisation. Such an organisation might evade or infringe municipal law only if it governed relations between organisation and staff. The complainants do not seek to show that it does.

Besides, the EPO observes that it is common practice for international organisations to grant fixed-term appointments. All the Tribunal need say on that score is that there is no general principle of the international civil service which requires an organisation to confer only permanent appointments.

The plea fails.

25. The complainants submit that the new rules are harsh in failing to provide redundancy and other end-of-service entitlements.

The Organisation does not deny that but says that it so warns contract staff, who may take out individual insurance if they wish.

It may be a pity that contract staff do not enjoy the same degree of protection as the unemployed under municipal law. But the fact that they do not affords no grounds for setting aside the rules applicable to such staff. On that score too their position is subject to change, either by agreement with member States or by amendment of the Organisation's own rules.

Again the plea cannot be sustained.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.